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Supreme Court, U.S.
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In The

Supreme Court of the United States

DON STENBERG, Attorney General of the State of Nebraska, et al.,

Petitioners,

v.

LEROY CARHART, M.D.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICI CURIAE LOUISIANA AND MISSISSIPPI IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*

Amici Curiae have a substantial interest in the disposition of this case. Louisiana and Mississippi have both enacted statutory bans on "partial birth abortion." Louisiana's ban was permanently enjoined in federal district court, and is now pending before the United States Court of Appeals for the Fifth Circuit. Mississippi's partial birth abortion ban has not been challenged, and is currently in effect.

Amici believe that bans on partial birth abortion are constitutional because this Court's abortion jurisprudence does not prevent a state from prohibiting the killing of a child in the process of being born. *Amici* present to this Court a constitutional argument supported by both precedent and medical science.

SUMMARY OF THE ARGUMENT

The abortion liberty has always been defined by this Court as a woman's right to "terminate her pregnancy." *See e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992). Medical science establishes that the onset of the birth process terminates pregnancy. Therefore, any ban on killing after the onset of the process of birth does not interfere with the right to terminate pregnancy. Consequently, this Court's abortion jurisprudence, including analytical concepts such as undue burden and viability, does not govern the question of whether Nebraska's ban on killing a child in the process of birth is constitutional. As Justice Marshall commented during the second oral

argument in *Roe*, killing a child in the process of birth "is not an abortion."

Because abortion is not prevented by Nebraska's ban on killing a child after pregnancy has been terminated, Nebraska's ban is constitutional if it is rationally related to a legitimate state interest. *See Washington v. Glucksberg*, 521 U.S. 702 (1997). Nebraska's ban on killing a child in the process of birth is reasonably related to its interest in preventing the erosion of the line between abortion and infanticide. Nebraska's concern is neither hypothetical nor irrational.

Nebraska acted reasonably to prevent infanticide from ever becoming a reality. Because its ban on the killing of a child in the process of birth does not regulate the "termination of pregnancy," this Court should reverse the lower court and uphold the Nebraska Partial Birth Abortion Act.

ARGUMENT

I. THE NEBRASKA STATUTE DOES NOT CREATE AN UNDUE BURDEN ON THE RIGHT TO ABORTION BECAUSE, AS JUSTICE MARSHALL COMMENTED DURING THE REARGUMENT OF *ROE*, KILLING A CHILD IN THE PROCESS OF BEING BORN "IS NOT AN ABORTION."

A. Undue Burden Analysis Does Not Apply to Nebraska's Ban on Killing a Child During the Process of Birth.

Since 1973, this Court has consistently defined the abortion liberty as the right of a woman to choose

"whether or not to **terminate her pregnancy**." *Roe v. Wade*, 410 U.S. 113, 153 (1973) (emphasis added). As set forth below, medical science establishes that the onset of the birth process terminates pregnancy. Therefore, Nebraska's ban on killing a child in the process of being born addresses conduct that intentionally occurs *after* termination of the pregnancy. Consequently, Nebraska's Legislative Bill 23 of 1997 ("LB 23")[1] does not interfere with the right to terminate pregnancy, and this Court's abortion jurisprudence, including the undue burden standard, does not govern the question of whether LB 23 is a constitutional exercise of legislative authority.

During the 1972 reargument of *Roe*, this Court discussed whether the term "abortion" encompassed killing a child during the process of birth. The following exchange between Justice Marshall and counsel for the State of Texas occurred in the context of a discussion about the Texas parturition statute, which had not been challenged as unconstitutional:

. . . .

JUSTICE MARSHALL: What does that [parturition] statute mean?

MR. FLOWERS: Sir?

JUSTICE MARSHALL: What does it mean?

MR. FLOWERS: I would think that –

JUSTICE STEWART: That it is an offense to kill a child in the process of childbirth?

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[1] Codified as Neb. Rev. Stat. Ann. §§ 28-326(9), 28-328 (Supp. 1998).

MR. FLOWERS: Yes sir. It would be immediately before childbirth, or right in the proximity of the child being born.

JUSTICE MARSHALL: Which is not an abortion.

MR. FLOWERS: Which is not – would not be an abortion, yes, sir. You're correct, sir. It would be homicide.

. . . .

Reargument of Roe v. Wade, October 11, 1972 (emphasis added) (*see* Appendix A at 3).[2]

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[2] The entire written transcript of the October 11, 1972 reargument, along with a link that plays the audio tape, can be found at the Northwestern University web site: *http://oyez.nwu.edu/support/cases/334/reargument.html*.

This exchange followed Flowers' comment that the plaintiffs had attacked Texas' abortion statutes, found at Articles 1191 through 1196, with the exception of Article 1195. Flowers then quoted the entirety of the unchallenged Article 1195, which provides: "Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years." This provision is currently codified at Tex. Rev. Civ. Stat. Ann. art. 4512.5.

This Court's decision in *Roe* acknowledged in footnote 1 that Texas' parturition statute was "not attacked." 410 U.S. at 117 n.1. In 1974, a Texas Attorney General opinion echoed Justice Marshall, concluding that Article 1195 is "unaffected" by *Roe* because the element requiring that the child "be in a state of being born" means that the article **"is not, in truth, an abortion statute."** *Tex. Op. Atty. Gen.*, Opinion No. H-369 at 3 (August 13, 1974) (emphasis added).

B. The Right to "Terminate Pregnancy" Does Not Include the Right to Kill a Child During the Process of Birth; There is no Such Thing as a Vaginal Abortion.

Justice Marshall's comment that killing a child in the process of birth "is not an abortion" is fully supported by established medical science. It is also confirmed by this Court's consistent definition of the abortion liberty as the right to terminate pregnancy.

1. Medical science establishes that pregnancy is terminated by the onset of the birth process.

In *Roe*, this Court's understanding of abortion was informed by medical science: "[the pregnant woman] carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human **uterus**." 410 U.S. at 159 (emphasis added) (*citing* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 478-479, 547 (24th ed. 1965)). Nebraska, like this Court in *Roe* and its progeny, also relied upon medical definitions when it enacted LB 23. Because medical science establishes that pregnancy is terminated by the onset of the birth process, LB 23 does not regulate "abortion," as that term is understood both medically and legally.

The development of a human being takes place in two stages. The first stage is pregnancy, which begins at conception and ends when the living child is delivered or removed from the uterus into the birth canal. *See* TABER'S CYCLOPEDIC MEDICAL DICTIONARY 1543, 2046 (18th ed. 1997) (defining *pregnancy* as the "condition of carrying an

embryo [or fetus] in the uterus;" defining *uterus* as "[a] reproductive organ for containing and nourishing the embryo and fetus . . . to the time the fetus is born"). As such, the pregnancy stage is confined to the development of the child while in the uterus of his or her mother.

The stage after pregnancy is birth, followed by the whole process of postnatal growth through adulthood and old age. The birth stage starts when the living child begins to exit the womb into the birth canal.[3] *See* TABER's at 223 (defining *birth* as the "passage of a child from the uterus"); *see also* DORLAND's at 202 (28th ed. 1994) (defining *birth* as "the act or process of being born" and *complete birth* as "the complete separation of the infant from the maternal body (after cutting of the umbilical cord)").[4]

Vaginal birth is an irreversible process, not a single event. As a matter of medical fact, pregnancy is terminated and the process of birth has begun once the membranes of the amniotic sac are ruptured and the living fetus emerges from the uterus, beyond the cervical os and into the vaginal (birth) canal. *See Declaration of Jack A. Andonie, M.D.*, ¶¶ 8-10 (Appendix B); *Declaration of Raymond Gasser*, Ph.D., ¶¶ 10-11 (Appendix C).[5] Thus, there is a significant medical distinction between the locus where intrauterine fetal stasis is maintained (i.e., pregnancy), and the dynamic process of birth. Pregnancy has never occurred or been maintained in the vaginal canal.[6] The delivery of the child into the birth canal means that the complete birth of the child is inevitable.

In the medical vernacular, the onset of the birth process is one method of terminating a pregnancy, while induced abortion is another.[7] Medically, then, it is an oxymoron to speak in terms of "aborting" a living fetus that is partially vaginally delivered. This is so because induced abortion is any procedure that causes fetal death in utero, thereby causing "the premature expulsion from the uterus of the products of conception."[8] In other words, there is no such thing as a "vaginal abortion." That non-medical term is simply a euphemism for the

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[3] The terms womb and uterus are interchangeable. *See* DORLAND's at 1846 (womb is defined as "the uterus").

[4] In *Roe*, this Court did not "resolve the difficult question of when life begins," because "the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." 410 U.S. at 159 (emphasis added). Here, by contrast, there is no need to speculate about when birth begins. There is no raging debate or lack of consensus about the process of birth among "those trained in the respective disciplines of medicine, philosophy, and theology." *Id.*

[5] The Declarations of Dr. Andonie and Dr. Gasser are part of the official record in the Louisiana partial birth abortion case currently pending in the United States Court of Appeals for the Fifth Circuit, which is set for oral argument on March 2, 2000. *Causeway Medical Suite v. Foster*, No. 99-30324 (5th Cir.), *on appeal from* 43 F. Supp. 2d 604 (E.D. La. 1999). These basic and unquestionable medical facts testified to by Louisiana's medical experts were not controverted.

[6] App. 8, *Andonie Decl.* at ¶ 10; App. 16, *Gasser Decl.* at ¶ 11.

[7] App. 8, *Andonie Decl.* at ¶ 6.

[8] DORLAND's at 4; App. 8, *Andonie Decl.* at ¶¶ 6-7. Actually, the phrase "fetal death in utero" is a tautology because "fetal death" means "death in utero." DORLAND's at 430.

criminal termination of the life of a child after the pregnancy has already been terminated by the onset of the process of birth.

Therefore, in enacting LB 23, the legislature was not regulating abortion at all, as that term is medically understood. Rather, Nebraska proscribed the killing of a child after the process of birth has begun, and labeled that crime "*partial birth* abortion."[9]

That LB 23 is not in fact regulating abortion is a conclusion supported by medical science. The intentional delivery of a living child from the uterus into the vaginal canal signals a momentous medical, and now legal, event. Thus, where LB 23 speaks in terms of "partially delivers vaginally a living unborn child" it has thereby given effect to the medical distinction between pregnancy and birth. By its terms, then, LB 23 regulates the process of birth, also referred to as parturition.[10]

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[9] Although "partial birth abortion" is not a medical term, it has become a legal term of art that was adopted by Nebraska to describe the crime of killing a child in the process of being born.

[10] In 1992, the pioneer of the partial birth abortion procedure, Dr. Martin Haskell, distinguished his so-called "intact D&X" procedure from the "established D&E" method: "Classic D&E is accomplished by dismembering the fetus **inside the uterus** with instruments and removing the pieces through an adequately dilated cervix." Martin Haskell, M.D. *Dilation and Extraction for Late Second Trimester Abortion* 28 (NAF, Sept. 13, 1992) (emphasis added) (citing Grimes, D.A., Cates, W. Jr. (Berger, G.S., et al., ed.): Dilation and Evacuation, *Second Trimester Abortion – Perspectives After a Decade of Experience*, Boston, John Wright-PSG, 1981, p. 132.). Contrary to Haskell's description, Respondent Carhart claims he performs a procedure that he calls "D&E" in which fetal dismemberment takes place in the birth canal, i.e., by delivering a limb into the vaginal canal and using the cervical os as traction to dismember the child. *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1103 (D. Neb. 1998), *aff'd*, 192 F.3d 1142 (8th Cir. 1999), *cert. granted*, 120 S.Ct. 865 (U.S. Jan. 14, 2000).

Respondent Carhart claims that LB 23's ban on killing during the birth process would prevent him from doing these so-called "D&Es." Respondent Carhart is wrong. Merely pulling a limb into the birth canal, is not, for Nebraska, enough to trigger the statute. Although *Amici's* inevitable birth argument explains why pulling a limb into the birth canal terminates pregnancy, Nebraska has not legislated to the full extent the argument would support.

2. Abortion jurisprudence recognizes only a woman's right to terminate her pregnancy; this Court has never held that there is a right to kill a child in the process of being born.

This Court has consistently formulated the abortion liberty as a woman's right to "terminate her pregnancy." For example, in *Roe*, this Court stated,

> This right of privacy . . . is broad enough to encompass a woman's decision whether or not to **terminate her pregnancy.**

Roe, 410 U.S. at 153 (emphasis added).

Similarly, in *Casey*, this Court stated:

> From what we have said so far it follows that it is a constitutional liberty of the woman to have some freedom to **terminate her pregnancy.**[11]

Casey, 505 U.S. at 869 (emphasis added).

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[11] In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), this Court repeatedly articulated the abortion liberty as a "woman's right to **terminate her pregnancy**":

> "Yet 19 years after our holding that the Constitution protects **a woman's right to terminate her pregnancy** in its early stages . . . , that definition of liberty is still questioned." *Id.* at 844. "Constitutional protection of **the woman's decision to terminate her pregnancy** derives from the Due Process Clause of the Fourteenth Amendment." *Id.* at 846. "The extent to which the legislatures of the States might act to outweigh the interests of the woman in choosing to **terminate her pregnancy** was a subject of debate both in *Roe* itself and in decisions following it." *Id.* at 853. "We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate. The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so **that the right of the woman to terminate the pregnancy** can be restricted." *Id.* at 869. "We conclude the line should be drawn at viability, so that before that time **the woman has a right to choose to terminate her pregnancy**." *Id.* at 870. "The woman's right to **terminate her pregnancy** before viability is the most central principle of *Roe v. Wade*." *Id.* at 871. "Though **the woman has a right to choose to terminate** or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed." *Id.* at 872. " '*Roe* did not declare an unqualified constitutional right to an abortion, as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with **her freedom to decide whether to terminate her pregnancy.**' " *Id.* at 874 (quoting *Maher v. Roe*, 432 U.S. 464, 473-474 (1977) (internal quotation marks omitted)). "All abortion regulations interfere to some degree with a **woman's ability to decide whether to terminate her pregnancy.**" *Id.* at 875. "Not all burdens on the right to decide whether **to terminate a pregnancy** will be undue." *Id.* at 876. "Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to **terminate her pregnancy** before viability." *Id.* at 879. "Whether the mandatory 24-hour waiting period is nonetheless invalid because in practice it is a substantial obstacle to **a woman's choice to terminate her pregnancy** is a closer question." *Id.* at 885. "Rather, the right protected by *Roe* is a **right to decide to terminate a pregnancy** free of undue interference by the State." *Id.* at 887 (emphasis added to all quotations).

Once the child has moved from the pregnancy stage to the birth stage, a woman's right to "terminate her pregnancy" is not implicated because there is no longer a pregnancy to terminate. After commencement of the birth process, the intentional ending of the life of a partially born child is not an abortion at all, but rather the unlawful killing of a human being.

In *Wynn v. Scott*, federal district judge Marshall addressed a hypothetical statute providing that if a physician had a choice of procedures to terminate the

pregnancy, both of equal risk to the woman, the state could require the physician to choose the procedure which is least likely to kill the fetus. The court concluded that "[t]his choice would not interfere with the woman's right to terminate her pregnancy. It never could be argued that she has a constitutionally protected right to kill the fetus. She does not." 449 F. Supp. 1302, 1321 (N.D. Ill. 1978), *appeal dismissed*, 439 U.S. 8 (1978), *aff'd sub nom., Wynn v. Carey*, 599 F.2d 193 (7th Cir.1979) (citing Note, *Medical Responsibility of Fetal Survival Under Roe and Doe*, 10 Harv. Civ. Lib.-Civ. Rt. Rev. 444 (1975)).

The abortion liberty is not so broad that a woman may terminate her pregnancy " 'at whatever time, in whatever way, and for whatever reason she alone chooses.' " *Planned Parenthood v. Danforth*, 428 U.S. 52, 60 (1976) (quoting *Roe*, 410 U.S. at 153). Although a woman may have a qualified right to an empty womb, this Court has never held that she has a right to a dead child. *Cf. Planned Parenthood v. Ashcroft*, 462 U.S. 476, 483 n.7 (1983) (plurality) (describing as "remarkable" testimony of abortion provider Dr. Robert Crist that " 'the abortion patient has a right not only to be rid of the growth, called a fetus in her body, but also has a right to a dead fetus' ").

3. The abortion-related concept of viability is irrelevant.

Amici recognize the principle outlined in *Casey* that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion." *Casey*, 505 U.S. at 846. However, because medical science establishes

that pregnancy is terminated by the onset of the birth process, LB 23 does not regulate "abortion," as that term is understood both medically and legally.

"Viability" is about gestation; "partial birth abortion" is about location. Viability is a variable in the equation this Court developed to determine the strength of a state's interest in protecting an unborn child, as weighed against the right of the woman to choose to terminate her pregnancy. The issue of whether a state may protect the life of the unborn child necessarily arises prior to the time that the pregnancy has been terminated, *i.e.*, while the fetus is gestating in the womb. Thus, the pregnancy stage provides the only occasion where the decision of whether or not to permit the killing of a human being is dependent upon his or her viability.[12]

When the child has been delivered from the uterus into the vaginal canal, the woman is no longer "pregnant." Thus, abortion jurisprudence regarding viability does not provide the proper analytical framework to assess an asserted right to kill a child after the pregnancy has been terminated by the onset of the birth process. A state's authority to ban killing during the birth process should not, therefore, depend on whether the partially born child's gestational age is nine months or five months; whether the birth has begun naturally or has

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[12] This Court has never before addressed the issue of whether a State law that bans the intentional killing of partially born infants, whether viable or nonviable, is constitutional. *See* footnote 2, *supra* (discussing the Texas parturition statute that was "not attacked" in *Roe*).

been artificially induced; or whether the child is "viable" or "nonviable."

To expand the concept of viability to the process of birth would transform the right to terminate pregnancy into a new constitutional right to kill a child even after the pregnancy is terminated. Application of abortion principles to statutes regulating birth would thus erode the barrier between abortion and infanticide.[13]

II. LB 23 ADVANCES NEBRASKA'S LEGITIMATE INTEREST IN PREVENTING THE EROSION OF THE LINE BETWEEN ABORTION AND INFANTICIDE.

LB 23 regulates the process of birth, not abortion. Consequently, the subjective medical judgment of the abortion provider must give way to the state's regulation as long as it has a rational basis. LB 23 is rationally related to Nebraska's legitimate interest in preventing the erosion of the line between abortion and infanticide.[14]

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[13] This Court has stated that, in the context of abortion, the issue of maternal "health" can override a state's interest. *See e.g., Doe v. Bolton*, 410 U.S. 179, 192 (1973). Here, where Nebraska is regulating the process of birth to prevent the slide to infanticide, the issue of maternal health, absent a risk to the mother's life, also does not override the state's interest.

[14] The term "infanticide" is defined as

> The murder or killing of an infant soon after its birth. The fact of the birth distinguishes this act from 'feticide' or 'procuring abortion,' which terms denote the destruction of the fetus **inside the womb**.

BLACK'S LAW DICTIONARY 699 (5th ed. 1979) (emphasis added).

This Court's recent decision in *Washington v. Glucksberg*, 521 U.S. 702 (1997), is instructive on this point.

In *Glucksberg*, this Court held that a state has the right to proscribe, not merely regulate, physician-assisted suicide notwithstanding a physician's best medical judgment that assisted suicide is the best and most appropriate way to relieve a patient's pain or terminal illness. *Id.* at 734. The State of Washington argued that "permitting assisted suicide will start it down the path to voluntary and perhaps involuntary euthanasia." *Id.* at 732. This Court agreed: "Washington's ban on assisting suicide prevents such erosion." *Id.* at 733 (emphasis added). Because no fundamental right was implicated, a rational basis analysis was applied to reach the conclusion that "Washington's ban on assisted suicide is at least reasonably related to [its] promotion and protection" against abuses that could lead to the involuntary euthanasia of vulnerable neonates or elderly adults. *Id.* at 734.

Like Washington's ban on assisted suicide, Nebraska's ban on killing a child in the process of birth is reasonably related to its interest in preventing the erosion of the line between abortion and infanticide. Stated differently, LB 23 creates a firewall against infanticide upon the line that this Court has consistently drawn – "termination of pregnancy."[15]

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[15] The issue of whether a partially born human being is a "person" under the Fourteenth Amendment need not be reached by this Court to uphold LB 23. The fact that the partially born child is a living human being provides the State with a legitimate interest in preventing the killing of that child *after* the active process of birth has terminated the pregnancy. By

Nebraska's concern with avoiding the slippery slope to infanticide is neither hypothetical nor irrational. It is not hypothetical because serious proposals for the legalization of infanticide have been championed by prominent academicians. For example, Professor Peter Singer, who holds an endowed chair at Princeton University, justifies infanticide based on his position that "[i]f the fetus does not have the same claim to life as a person, it appears that the newborn baby does not either, and the life of a newborn baby is of less value to it than the life of a pig, a dog, or a chimpanzee is to the nonhuman animal." Peter Singer, *Practical Ethics* 169 (2d ed., Cambridge Univ. Press 1997). The following passage illustrates Singer's reasoning:

> [T]he fact that a being is a human being, in the sense of a member of the species Homo sapiens, is not relevant to the wrongness of killing it; it is, rather, characteristics like rationality, autonomy, and self-consciousness that make a difference. Infants lack these characteristics. Killing them, therefore, cannot be equated with killing normal human beings, or any other self-conscious beings. This conclusion is not limited to infants who, because of irreversible intellectual disabilities, will never be rational, self-conscious beings. . . . No infant – disabled or not – has as strong a claim to life as beings capable

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creating a barrier between abortion and infanticide, LB 23 is constitutional under rational basis scrutiny, such as applied in *Glucksberg*.

> of seeing themselves as distinct entities, existing over time.[16]

Id. at 182.

Nebraska's concern is not irrational because LB 23 is reasonably related to preventing the slippery slope to infanticide. Chief Judge Posner of the United States Court of Appeals for the Seventh Circuit criticizes bans on partial birth abortion as being "irrational" because such bans would not prevent "killing the [same] fetus in utero." *Planned Parenthood v. Doyle*, 162 F.3d 463, 471 (7th Cir. 1998) (Posner, J.); *see also Hope Clinic v. Ryan*, 195 F.3d 857, 878-879 (7th Cir. 1999) (*en banc*), *petition for cert. filed*, Jan. 10, 2000 (No. 99-1152) (Posner, J., dissenting). Judge Posner's criticism misses the point. Nebraska's purpose in enacting LB 23 was not to prevent the killing of a fetus in utero (abortion); rather, its purpose is to prohibit the killing of a child in the birth canal so as to prevent the erosion of the line between abortion and infanticide.

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[16] Professor Singer contends that "the life of a fetus . . . is of no greater value than the life of a nonhuman animal at a similar level of rationality." Singer then "admit[s] that these arguments apply to the newborn baby as much as to the fetus. A week-old baby is not a rational and self-conscious being, and there are many nonhuman animals whose rationality, self-consciousness, awareness, capacity to feel, and so on, exceed that of a human baby a week or a month old." Singer then states that the "widely accepted views about the sanctity of infant life . . . need to be challenged." To support his position in favor of infanticide, Singer reasons that "we should put aside feelings based on the small, helpless, and – sometimes – cute appearance of human infants" whose "helplessness or innocence" should not be preferred to the equally helpless and innocent fetus, "or, for that matter, to laboratory rats who are 'innocent' in exactly the same sense." *Id.* at 169-70.

In *Glucksberg*, this Court recognized the "reasonableness of the widely expressed skepticism about the lack of a principled basis for confining the right [to assisted suicide]." *Glucksberg*, 521 U.S. at 733 n.23 (quoting Brief for United States as Amicus Curiae 26 ("Once a legislature abandons a categorical prohibition against physician assisted suicide, there is no obvious stopping point")); *see also id.* at 785 ("[t]he case for the slippery slope is fairly made out here, . . . because there is a plausible case that the right claimed would not be readily containable") (Souter, J., concurring). Just as Washington's ban on assisted suicide is reasonable because there is no principled basis for confining that "right," so Nebraska's ban on killing a child in the process of birth is reasonable because there would be no principled basis for confining that "right" either.

For example, if a doctor may kill a child whose body has been intentionally delivered into the birth canal except for the head, why may he not also kill a child who has been partially delivered head first? And if he may kill a child who has been partially delivered head first, why may he not kill the child whose entire body is outside of the mother except for one of the child's feet which he holds in the birth canal? And if he may kill a child whose foot or little toe is held in the birth canal, why, then, may the doctor not kill the child who is completely expelled from her mother's body, but still attached to the umbilical cord?

Twenty-seven years ago, this Court could not have anticipated confronting the question now before it. If Nebraska cannot prohibit killing during the process of birth today, then what unimaginable questions will this Court be faced with tomorrow?

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted,

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February 28, 2000

APPENDICES

A. *Reargument of Roe v. Wade*, October 11, 1972.....App. 1

B. *Declaration of Jack A. Andonie, M.D.* (Oct. 1, 1998).....App. 6

C. *Declaration of Raymond Gasser, Ph.D.* (Oct. 1, 1998).....App. 13

APPENDIX A

Excerpt from the Transcript of the Reargument of Roe v. Wade, 410 U.S. 113 (1973) (Reargued on October 11, 1972). The entire transcript and audio file can be found at http://www.oyez.nwu.edu/support/cases/334/reargument.html

* * *

JUSTICE MARSHALL: Is there any statute in Texas that prohibits the doctor from performing any operation, other than an abortion?

MR. FLOWERS: I don't – I don't think so, sir. And there is another thrust of our argument. If we declare, as the appellees in this case have asked this Court to declare, that an embryo or a fetus is a mass of protoplasm similar to a tumor, then of course the State has no compelling interest whatsoever.

JUSTICE MARSHALL: But there is no – the only operation that a doctor can possibly commit that will bring on a criminal penalty is an abortion?

MR. FLOWERS: Yes, sir.

JUSTICE MARSHALL: Why?

MR. FLOWERS: As far as –

JUSTICE MARSHALL: Well, why don't you limit some other operations?

MR. FLOWERS: Because this is the only type of operation that would take another human life.

JUSTICE MARSHALL: Well, a brain operation could.

MR. FLOWERS: Well, there again that would be – I think that in every feat that a doctor performs that he is constantly making this judgment.

JUSTICE MARSHALL: Well, if a doctor performs a brain operation and does it improperly, he could be guilty of manslaughter, couldn't he?

MR. FLOWERS: I would think so, if he was negligent.

JUSTICE MARSHALL: Well, why wouldn't you charge him with manslaughter if he commits an abortion?

MR. FLOWERS: In effect, Your Honor, we did, in the Statute 1195 that has been very carefully avoided all throughout these proceedings. It's not attacked as unconstitutional, for some reason. If you will permit me to –

JUSTICE MARSHALL: But is it at issue here?

MR. FLOWERS: No, sir. You asked the question about whether we had made manslaughter – or an abortion manslaughter.

JUSTICE MARSHALL: Maybe the reason is: Why have two statutes?

MR. FLOWERS: Well, this was in context with – this is 1195. They are attacking 1191 through 1196, but omitted 1195. Here's what 1195 says – provides: "Whoever shall, during the parturition of the mother, destroy the vitality or life in a child in a state of being born, before actual birth and before actual birth – which child would have otherwise been born alive, which – shall be confined to the penitentiary for life, or not less than five years."

JUSTICE MARSHALL: What does that statute mean?

MR. FLOWERS: Sir?

JUSTICE MARSHALL: What does it mean?

MR. FLOWERS: I would think that –

JUSTICE STEWART: That it is an offense to kill a child in the process of childbirth?

MR. FLOWERS: Yes, sir. It would be immediately before childbirth, or right in the proximity of the child being born.

JUSTICE MARSHALL: Which is not an abortion.

MR. FLOWERS: Which is not – would not be an abortion, yes, sir. You're correct, sir. It would be homicide.

Gentlemen, we feel that the concept of a fetus being within the concept of a person, within the framework of the United States Constitution and the Texas Constitution, is an extremely fundamental thing.

JUSTICE STEWART: Of course, if you're right about that, you can sit down, you've won your case.

MR. FLOWERS: Your Honor –

JUSTICE STEWART: Except insofar as, maybe, the Texas abortion law presently goes too far in allowing abortions.

MR. FLOWERS: Yes, sir. That's exactly right. We feel that this is the only question, really, that this Court has to answer. We have a

JUSTICE WHITE: Do you think the case is over for you? You've lost your case, then, if the fetus or the embryo is not a person? Is that it?

MR. FLOWERS: Yes, sir, I would say so.

JUSTICE WHITE: You mean the State has no interest of its own that it can assert, and

MR. FLOWERS: Oh, we have interests, Your Honor – preventing promiscuity, say, maybe that's

JUSTICE WHITE: Mr. Flowers, your legislature apparently – or you're asserting that your State law wants to protect the life of the fetus?

MR. FLOWERS: Yes, sir.

JUSTICE WHITE: And, under State law, there is some right – there are some rights given to the fetus?

MR. FLOWERS: Yes, sir.

JUSTICE WHITE: And you are asserting those rights, against the right of the mother.

MR. FLOWERS: Balancing against the Ninth Amendment rights of the mother, within the framework

JUSTICE WHITE: But that's wholly aside from whether the fetus is a person under the Federal Constitution. You can still assert those rights, whether the fetus is a person or not.

MR. FLOWERS: Yes, sir.

CHIEF JUSTICE BURGER: Does Texas have judicial statutes on mutilation, making it a criminal act?

MR. FLOWERS: Yes, sir.

CHIEF JUSTICE BURGER: So that there are other assertions

MR. FLOWERS: Yes, sir.

CHIEF JUSTICE BURGER: – or procedures which could be criminal?

MR. FLOWERS: That's right.

CHIEF JUSTICE BURGER: If a man walked into a doctor's office and said, "I want you to cut off my right arm"

MR. FLOWERS: That's right – mutilation, castration – yes, sir. I had forgotten about those, Your Honor.

JUSTICE MARSHALL: Those statutes apply to doctors?

MR. FLOWERS: I would assume so, or anyone that would –

JUSTICE MARSHALL: Do you have any case that says so?

MR. FLOWERS: No, sir. I would say that there would have to be a culpability of proof in there, as in most criminal cases.

• • •

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

CAUSEWAY MEDICAL SUITE, et al,

PLAINTIFFS **Civil Action**

v.

No. 97-2211 "T"

MURPHY J. FOSTER, JR. Governor
For the State of Louisiana, et al,

DEFENDANTS.

DECLARATION OF JACK A. ANDONIE, M.D.

I, Jack A. Andonie, M.D., declare under the penalty for perjury that the following is true:

1. I am a Clinical Professor in the Department of Obstetrics and Gynecology at LSU Medical School. I am board-certified in obstetrics/gynecology and I am the Founder of Lakeside Women's Specialty Center, Ltd. in Metairie, Louisiana. I received my Medical Degree from LSU Medical School in 1962. I serve as Medical Director at Lakeside Hospital and serve on the current board of the LSU Board of Supervisors. I teach and practice obstetrics-gynecology. I am a licensed medical doctor in the state of Louisiana. A more complete statement of my credentials and training are provided in my attached curriculum vitae. *See Attachment A.*

2. During the course of my thirty-six year medical career in obstetric/gynecology, I have examined and/or

treated approximately twenty thousand women and delivered approximately ten thousand babies. I am a medical expert in the areas of pregnancy, the process of birth, and birth. It is based upon my years of experience as a physician specializing in obstetrics and gynecology, my education, training, and the ongoing study of the relevant medical literature and statistical data normally relied upon by doctors of obstetrics and gynecology in their practices that I offer the following expert opinions.

3. Pursuant to a request by representatives of the Office of the Attorney General for the State of Louisiana, I have reviewed Act 906 of the 1997 Regular Session of the Louisiana Legislature (the "Act"), which creates "the crime of partial-birth abortion" La. R.S. 14:32.9(D). I have been asked to review the Act and offer my expert medical opinion on what the Act proscribes and whether or not a reasonable physician, upon reading the Act, will be sufficiently apprized of what is and what is not permitted under the Act.

4. The Act, with certain detailed exceptions (e.g., the life of the mother), proscribes what it refers to as "partial-birth abortion." The Act defines "partial-birth abortion" as

> the performance of a procedure on a female by a licensed physician or any other person whereby a living fetus or infant is partially delivered or removed from the female's uterus by vaginal means and with specific intent to kill or do great bodily harm is then killed prior to complete delivery or removal. La. R.S. 14:32.9(A)(1).

5. The plain language of the Act proscribes any procedure that is intended to kill an infant in the process

of being born. By its very terms, then, the Act does not include within its proscription any abortion procedure.

6. Induced abortion is one method of terminating a pregnancy, the onset of the birth process is another.

7. Induced abortion is any procedure which causes fetal death *in utero*, thereby causing "the premature expulsion *from the uterus* of the products of conception." *Dorland's Illustrated Medical Dictionary* 4-5 (28th edition 1994) (Dorland's).

8. The process of birth begins, and complete birth is inevitable, once the membranes of the amniotic sac are ruptured, and the infant begins its emergence from the uterus through the cervical os (opening of the uterus) and into the vaginal canal.

9. The delivery or removal of any part of a living fetus from the uterus, beyond the cervical os, and into the vaginal canal after the membranes of the amniotic sac have been ruptured is a significant medical event – an event that is acknowledged under the Act. It is medically significant because pregnancy has ended and the process of birth has begun.

10. Pregnancy describes the locus where intrauterine fetal stasis is maintained. Pregnancy has never occurred or been maintained in the vaginal canal.

11. Because it is a medical fact that pregnancy is over (terminated) once the process of birth has begun, the Act's plain language regulates the birth process, not any abortion procedure. This is made plain because the Act proscribes the intentional killing of a living fetus or infant who has been *partially delivered or removed from the*

female's uterus by vaginal means. In medical terms, the Act does not prohibit those procedures undertaken to terminate *pregnancy*, because the Act's terms address specific intent to kill a living fetus or infant *after* the pregnancy has already been terminated.

12. Where the Act describes a "living fetus or infant [that] is partially delivered or removed from the female's uterus by vaginal means" it has, thereby, given effect to the medical distinction between (1) the locale where intrauterine fetal stasis is maintained (i.e., pregnancy) and (2) the dynamic irreversible process of birth. "Birth" is a process, not a single event. The birth process *begins* when the membranes of the amniotic sac are ruptured and the fetus emerges beyond the cervix into the vaginal canal, and *ends* with the complete separation from the mother.

13. By its own terms, then, the Act clearly regulates the process of birth which begins when the living fetus begins to exit the womb as described above. (The terms womb and uterus are synonymous. Dorlands at 1846 ("womb" is defined as "the uterus")).

14. The Act's plain language proscribes only those procedures wherein a living fetus (infant) is partially delivered or removed into the vaginal canal itself. A fetus or fetal part suctioned out through an enclosed vacuum tube running through the vagina would not, in medical terminology, be characterized as a fetus who is "partially delivered or removed from the female's uterus by vaginal means."

15. There is no question that the Act *does not* proscribe the destruction of a fetus *in utero*, i.e. abortion,

because by its very terms the Act proscribes only those procedures designed to kill an infant that has been partially delivered out of the uterus at which point pregnancy has ended, the process of birth has begun, and abortion is no longer a medical possibility.

16. Though the term "partial-birth abortion" is not a medical term, it is descriptive of a medical procedure(s), as defined by the Act, that is practiced by some abortion doctors who refer to the procedure by various terms including "D&X," "intact dilation and extraction," "intact dilation and evacuation, "intact D&E," and "intact D&X.".

17. Plaintiffs' own description of the "D&X procedure" would clearly qualify as a procedure prohibited by the plain terms of the Act:

> The intact D&E, "D&X," or "intact D&X" procedure is a variant of the traditional D&E procedure. . . . [T]he cervix is gradually dilated and the fetus is removed intact. . . . [T]he physician then creates a small opening at the base of the skull and evacuates some of the contents, allowing the calvarium [now emptied skull] to pass through the cervical opening. Alternatively, once the fetus is partially extracted, the physician crushes the skull with forceps. . . . The intact removal of the fetus is what distinguishes an intact D&E procedure from a traditional D&E procedure. [*Complaint* at ¶ 41.]

18. The Act proscribes doing "great bodily harm . . . " to "a living fetus or infant" that is "partially delivered . . . . " Medically speaking, you can do "great bodily harm" only to an intact "living fetus" or "infant." Therefore, a reasonable medical doctor reading the Act would understand "living fetus" and living "infant" to mean the living fetal (infant) organism as opposed to living fetal cells or dismembered fetal limbs or body parts.

19. Medical science recognizes that the living fetal (infant) organism is living if it shows signs of life, such as beating of the heart, pulsation of the umbilical cord or movement of voluntary muscles.

20. The Act's plain language clearly does not proscribe the cephalocentesis procedure, which is removal of fluid from an enlarged head of a fetus with the most severe form of hydrocephalus. In such a procedure, a needle is inserted into the enlarged ventricle of the brain (the space containing cerebrospinal fluid). Fluid is then withdrawn which results in reduction in the size of the head so that delivery can occur. This procedure is not intended to kill the fetus, and, in fact, is often associated with the birth of a live infant. This is an important distinction between a needle cephalocentesis, which is intended to facilitate the birth of a living fetus, and the procedure described in the Act, which involves specific intent to kill a living fetus which has been partially delivered.

22. Upon reading the Act, a reasonable physician will certainly understand that destruction of the fetus *in utero*, i.e., abortion, remains protected in the law, and that the only procedure prohibited is partial delivery or removal of a living fetus or infant into the vaginal canal for the purpose of pausing the birth process to carry out a second step of intentionally killing the infant prior to complete delivery or removal.

I affirm under the penalties of perjury that the statements in my Declaration are true.

10/1/1998 /s/ Jack A. Andonie
Date Jack A. Andonie, M.D.

Expert Witness Disclosure Required by Fed. R. Civ. P. 26(a)(2)(B)

1. The disclosure of my opinions, basis, reasons, data, qualifications are given in the attached affidavit.
2. My list of all publications within the last ten years is provided in the attached curriculum vitae.
3. My compensation is reasonable expenses, but no fee.
4. I have never before testified as an expert at trial or by deposition.

10/1/1998 /s/ Jack A. Andonie
Date Jack A. Andonie, M.D.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

CAUSEWAY MEDICAL SUITE, ET Al.,

PLAINTIFFS **Civil Action**

v.

No. 97-2211 "T"

MURPHY J. FOSTER, JR., ET Al.,

DEFENDANTS.

DECLARATION OF RAYMOND GASSER, PH.D.

I, Raymond Gasser, Ph.D., declare under the penalty for perjury that the following is true:

1. I am a Professor in the Department of Cell Biology and Anatomy at LSU Medical School (LSUMC), and, since 1980, I have been the course Director for Human Prenatal Development. I have been an Adjunct Professor of Obstetrics and Gynecology since 1994. I have been a member of the International Anatomical Nomenclature Committee since 1991 and I head the subcommittee on human embryological terms. Since 1991 I have been on the Advisory Committee, Human Developmental Anatomy Center, Armed Forces Institute of Pathology in Washington D.C. Also, since 1991 I have been Adjunct Curator for the Carnegie Collection of Human Embryos, Human Developmental Anatomy Center, Armed Forces Institute of Pathology, Washington D.C. My other credentials and experience are provided in my attached curriculum vitae. *See Attachment A – Curriculum Vitae.*

2. Based on my education, training, research, years of experience as a Professor of Anatomy and Ob/Gyn, personal knowledge, study of the relevant medical literature and statistical data recognized as reliable in the medical profession, I offer the following expert opinions.

3. Pursuant to a request by representatives of the Office of the Attorney General for the State of Louisiana, I have reviewed Act 906 of the 1997 Regular Session of the Louisiana Legislature (the "Act"), which creates "the crime of partial-birth abortion" La. R.S. 14:32.9(D). I have been asked to review the Act and offer my expert opinion on what the Act proscribes and whether or not a reasonable physician, upon reading the Act, will be sufficiently apprized of what is and what is not permitted under the Act.

4. The Act, with certain detailed exceptions (e.g., the life of the mother), proscribes what it refers to as "partial-birth abortion." The Act defines "partial-birth abortion" as

> the performance of a procedure on a female by a licensed physician or any other person whereby a living fetus or infant is partially delivered or removed from the female's uterus by vaginal means and with specific intent to kill or do great bodily harm is then killed prior to complete delivery or removal. La. R.S. 14:32.9(A)(1).

5. The Act is clear, in medical/anatomical terms, about the location of the "living fetus or infant" that cannot, with specific intent, be killed.

6. The clarity of the Act is manifest because by its very terms it describes a living fetus or infant who is in the process of being born.

7. A living fetus or infant is in the process of being born when he or she begins to emerge from the uterus through the cervical os into the vaginal canal, which occurrence denotes the medical fact that the inevitable and unstoppable process of birth has begun.

8. Because the Act addresses a procedure that involves specific intent to kill a living fetus or infant who has been intentionally partially removed from the uterus into the vaginal canal, the Act regulates the process of birth, not the induced abortion of an unborn fetus.

9. Induced abortion is one method of terminating a pregnancy, the onset of the birth process is another.

10. The significant medical distinction between pregnancy and the process of birth is best made by describing the anatomical structure of the woman with reference to the locus of the living fetus within that structure: *See Exhib. D-5, "Uterus, Vagina and Supporting Structures."*

a. The uterus is the muscular organ in a female in which a developing embryo and fetus is nourished.

b. The cervix is the neck of the uterus which opens into the vagina. The cervical os is the opening of the cervix.

c. The amniotic sac is the protective membrane between the cervical os and the vaginal canal.

d. The vagina is the canal in the female, extending from the vulva to the cervix.

As long as the fetus remains within the uterus a woman is pregnant. When, however, the membranes of the amniotic sac have been ruptured and any part of the living fetus or infant is delivered through the cervix, past the cervical os and into the vaginal canal, pregnancy has ended and the process of birth has begun.

11. The medical/anatomical distinction between pregnancy and the process of birth is underscored by the fact that pregnancy has never occurred or been maintained in the vaginal canal.

12. "Fetus" is the medical term to describe "the *unborn* offspring in the postembryonic period, after major structures have been outlined, in humans from nine weeks after fertilization until birth." DORLAND'S *ILLUSTRATED* MEDICAL DICTIONARY 617 (28th Ed. 1994). The term "fetus" means only the unborn child, not the umbilical cord or the placenta, although those structures are of fetal origin. *See Exhibit D-6, Lennart Nilsson photograph.*

14. Where the Act speaks of a "living fetus or infant that is partially *delivered or removed from the female's uterus by vaginal means"* it can, of medical/anatomical necessity, only mean that the living fetus or infant is removed from the uterus into the vaginal canal and does not include the suction of a fetus or fetal parts "into an enclosed suction cannula [tube]" running through the vagina.

15. In medical terms *fetus* means preborn human offspring 9 weeks after conception, and is expressly defined in the Act as meaning "the biological offspring of human parents."

16. *Infant*, as expressly defined in the Act means "the biological offspring of human parents." *Infant* is defined as " . . . human young from birth to 12 months; it includes the newborn or neonatal period." DORLAND'S *ILLUSTRATED* MEDICAL DICTIONARY 836 (28th Ed. 1994).

17. The Act proscribes doing "great bodily harm . . . " to "a living fetus or infant" that is "partially delivered . . . . " Medically/anatomically speaking, you can do "great bodily harm" only to an intact "living fetus" or "infant." Therefore, a reasonable medical doctor reading the Act would understand "living fetus" and living "infant" to mean the living fetal (infant) organism as opposed to living fetal cells or dismembered fetal limbs or body parts.

18. The fetal/infant organism is living if it shows signs of life, such as beating of the heart, pulsation of the umbilical cord or movement of voluntary muscles.

19. I have reviewed the artist's illustration that was used by Dr. Jack Andonie to explain partial birth abortion to the Louisiana House and Senate committees considering the Act at issue (a copy of which is attached hereto as *"Attachment B"*). It is my expert opinion that the illustration accurately depicts a baby 8-10 inches long, measured to scale to the doctor's hand. This corresponds exactly to the size of a baby during the 20-24 week range of pregnancy. Thus, the illustration accurately depicts the anatomical structures of the fetus, then partially born infant and female as described by Dr. Haskell in his 1992 paper entitled "Dilation and Extraction for Late Second Trimester Abortion." [*See* Defendants' Exhibit D-2].

20. Plaintiffs' own description of the "D&X procedure" mirrors the illustration described in paragraph 19 above and would clearly qualify as a procedure prohibited by the plain terms of the Act:

> The intact D&E, "D&X," or "intact D&X" procedure is a variant of the traditional D&E procedure. . . . [T]he cervix is gradually dilated and the fetus is removed intact. . . . [T]he physician then creates a small opening at the base of the skull and evacuates some of the contents, allowing the calvarium [now emptied skull] to pass through the cervical opening. Alternatively, once the fetus is partially extracted, the physician crushes the skull with forceps. . . . The intact removal of the fetus is what distinguishes an intact D&E procedure from a traditional D&E procedure. [*Complaint* at ¶ 41.]

21. A reasonable person reading the Act will have no doubt that he/she is prohibited only from intentionally killing a living fetus or infant that has been partially delivered into the vaginal canal.

I affirm under the penalties of perjury that the statements in my *Declaration* are true.

10/1/1998 /s/ Raymond Gasser
Date Raymond Gasser, Ph.D.

Expert Witness Disclosure Required by Fed. R. Civ. P. 26(a)(2)(B)

1. The disclosure of my opinions, basis, reasons, data, qualifications are given in the attached affidavit.
2. My list of all publications within the last ten years is provided in the attached curriculum vitae.
3. My compensation is reasonable expenses, but no fee.
4. I have testified as an expert at trial or by deposition in the following:

10/1/1998 /s/ Raymond Gasser
Date Raymond Gasser, Ph.D.